

To: glovato@ndep.nv.gov[glovato@ndep.nv.gov]; jrcollins@ndep.nv.gov[jrcollins@ndep.nv.gov]; Micheline N. Fairbank[MFairbank@ag.nv.gov]; Frederick J. Perdomo[FPerdomo@ag.nv.gov]; Herrera, Angeles[Herrera.Angeles@epa.gov]; Ball, Harold[Ball.Harold@epa.gov]; Gene Seidlitz (gseidlitz@blm.gov)[gseidlitz@blm.gov]; rthomas@blm.gov[rthomas@blm.gov]; bamme@blm.gov[bamme@blm.gov]; Cohen, Adam (Adam.Cohen@dgsllaw.com)[Adam.Cohen@dgsllaw.com]; Block, Nathan[Nathan.Block@bp.com]; Kryska, Eric G[eric.kryska@bp.com]
Cc: Jeryl Gardner[JGARDNER@ndep.nv.gov]; Collins, Jim[Collins.Jim@epa.gov]; Minor, Dustin[Minor.Dustin@epa.gov]; Gallery, Patricia A[patricia.gallery@bp.com]; Maldonado, Lewis[Maldonado.Lewis@epa.gov]; David Davis (drdavis@blm.gov)[drdavis@blm.gov]; Seter, David[Seter.David@epa.gov]
From: Johnson, Brian S
Sent: Wed 1/11/2017 5:23:21 PM
Subject: RE: Anaconda NPL Deferral - EPA/BLM/NDEP/ARC - ARC Response

Greg:

Thanks for preparing this summary and the attached draft schedule. You have asked that ARC elaborate on its desire for (i) a covenant not to sue from the United States following remedy construction completion, and (ii) resolution of EPA's past costs and the existing CERCLA administrative orders.

As to the first issue (federal covenants), during the meeting on December 14, 2016, counsel for EPA at first seemed skeptical about the availability of federal covenants under a deferral path, as opposed to the Superfund Alternatives Site approach. However, Jim Collins said that covenants were not necessarily foreclosed, and Nathan Block explained ARC's view that covenants could be provided (and have been provided at other sites) following remedy implementation. ARC envisions a process whereby EPA would commit in the Deferral Agreement to refrain from intervening during remedy selection and implementation as long as the remedy selected by NDEP in a record of decision is and remains "CERCLA protective." The Deferral Agreement would in turn provide some specificity about what "CERCLA Protective" means. In addition, EPA would agree in the Deferral Agreement to assess and certify remedial action completion, as required under CERCLA Section 122(f)(3) for a covenant not to sue for future liability, once ARC informs NDEP and EPA that remedy construction is finished. If EPA confirms in that certification assessment, after consulting with NDEP, that the performance standards set forth in the ROD have been met and that covenants are otherwise appropriate based on the factors listed in CERCLA Section 122(f)(4), EPA would provide ARC with a covenant not to sue at that time. The covenant would be subject to standard reopeners for unknown conditions and the need to ensure protection of public health and the environment. This could be done in the form of either a modification to the Consent Decree entered into between NDEP and ARC at the outset of the remedial action or through a separate consent decree entered into between ARC and the United States.

ARC does not believe there is anything in CERCLA Section 122 (f) or applicable EPA guidance that precludes this type of process for a post-remedial-action certification of completion and

federal covenants. EPA would effectively be providing a covenant not to sue after the remedy has been selected and implemented, but that is not so different from the standard form of covenant for future liability, which only takes effect upon certification of completion and which is conditioned on satisfactory performance of the Settling Defendant's obligations. Also, the consent decree would presumably include obligations for ongoing five-year reviews, performance of further response actions if NDEP and EPA determine the remedial action is not protective, operations and maintenance, and payment of future response costs. As a result, there would be adequate consideration given for the federal covenants.

As we understand it, EPA's position is that they won't offer a covenant without first ordering some work. To us, this seems to be premised on an unnecessary and artificial division between today and a post-deferral state lead site progression. History is not erased. EPA has ordered and directed removal actions. EPA has ordered and overseen risk assessment. And, EPA has concurred in the conclusions around the extent of mine-impacted groundwater. Recognizing that substantial history and context, there is plenty for which victory can be claimed. For what remains, a deferral to NDEP for the remainder is imminently appropriate. With the process outlined above and past costs yet to be resolved (discussed below), deferral in this case does not, in any way, equate to EPA having not been adequately involved or being disconnected to the point that they take unnecessary risks in providing the covenants.

So, to respond to NDEP's and EPA's request that ARC reconsider whether federal covenants are really a threshold requirement for the deferral process and ARC's funding commitment for OU-8, the answer is that that we still think federal covenants are an important and workable component of the proposed framework, recognizing that: (i) the covenants would not be granted until after the remedial action is complete, (ii) the covenants would be subject to standard reopeners, and (iii) EPA would still need to certify completion of the remedial action and verify satisfaction of performance standards and the Section 122(f)(4) factors before providing the covenants, but (iv) EPA would commit up front in the Deferral Agreement to performing the certification assessment and providing the covenants after confirming satisfaction of those requirements when the remedy is complete.

As to the second issue (EPA past costs), ARC still thinks it is important to resolve EPA's past cost claims and retire the existing EPA orders as an initial step in the deferral and alternative funding process. We didn't really talk much about past costs during the December 14 meeting, but we also didn't hear anything suggesting that EPA is not amenable to working out an acceptable settlement. Your proposed schedule for resolving these issues by July 2017 seems a bit aggressive but not unreasonable.

The identification and sequencing of the other tasks shown in your proposed schedule otherwise seem consistent with what we have been discussing.

Thanks,

Brian S. Johnson

Liability Business Manager

Cell: 832 239-2711